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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

EDWARD L. FERIS and ALLEN L. FERIS, co-partners, doing business as FERIS BROS. TRUCKING CO., Appellants,

v.

LEO A. BALCOM and DOROTHY LORRAINE BALCOM, co-partners, doing business as D & L LOGGING COMPANY or D & L Logging Co.; and C. C. CAFFALL, R. H. CAFFALL and REX CAFFALL, JR., co-partners, doing business as CAFFALL BROTHERS FOREST PRODUCTS or CAFFALL BROTHERS; and CAFFALL BROS. FOREST PRODUCTS, INC., a corporation

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

Robert W. Gilley
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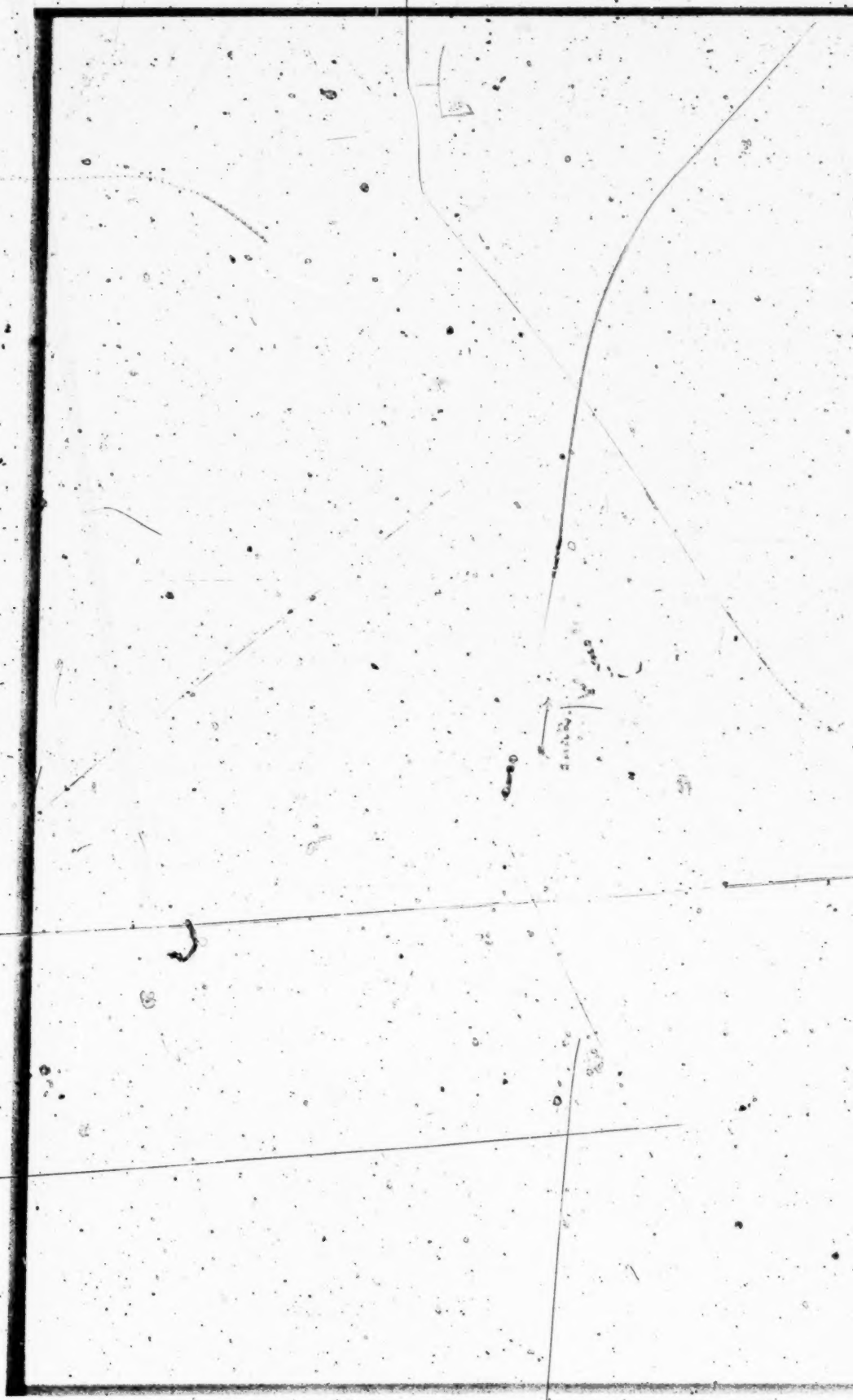

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Circuit Court for Clackamas County, Oregon, rendered no formal opinion, but did deliver an opinion from the bench which is reported in the transcript, Volume I, pages

61 to 70, interspersed among statements of counsel. It is set forth in Appendix, Exhibit A, infra, page 1a. The opinion of the Supreme Court of Oregon is reported at 85 Or. Adv. 453, 432 P.2d 684. It is set forth in Appendix, Exhibit B, infra, page 2a.

JURISDICTION

This suit was brought by appellants in equity under the authority of Section 87.645, Oregon Revised Statutes, to foreclose a logger's lien on logs hauled by appellants to ponds and other places designated by appellees, in which appellants pleaded such a lien, and prayed for a judgment and a decree foreclosing the lien.

Appellees pleaded affirmatively and have contended throughout that appellants' lien was void on these grounds: First, appellants' lien notice asserted a lien for labor of their employees as well as their own labor as individuals. Second, appellants

are not entitled to a lien for the labor of their employees, by virtue of a decision of the Supreme Court of Oregon construing the logger's lien statute, Section 87.125, Oregon Revised Statutes: McKinley v. Tice, 129 Or. 190, 276 P. 1110 (1929). Third, there was therefore a commingling of lienable and non-lienable items which rendered the notice of lien defective and the lien itself void.

Appellants concede that appellees' first contention is correct. We also concede that appellees' third contention cannot be refuted if it is finally determined herein that appellants do not have a lien for the labor of their employees. On the other hand, this third contention cannot be sustained if appellants are held to have such a lien.

The sole controversy before this Court, therefore, is concerned with appellees' second contention, which appellants deny. Appellants do concede, however, that the

Court declared in the McKinley case and in the present case that a hauler of logs cannot have a logger's lien for the labor of his employees.

Appellants pleaded affirmatively, and have contended throughout that the limitation that a hauler of logs to ponds and similar places, is not entitled to a logger's lien for the labor of his employees, so declared by the Supreme Court of Oregon, is invalid as it denies to appellants the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and violates the Constitution of Oregon, for the reason that a hauler of logs to an improvement or construction site, under like circumstances, is entitled to a mechanic's lien for his own labor and that of his employees, under Section 87.010, Oregon Revised Statutes.

The Circuit Court for Clackamas County upheld the constitutionality of the limita-

tion that an employer may not have a logger's lien for the labor of his employees, sustained all three of appellees' contentions, and entered an order dismissing this suit. The Supreme Court of Oregon decided this constitutional question in favor of the validity of the limitation herein mentioned, and dated and actually entered its final decree on November 15, 1967, Appendix, Exhibit C, infra, page 3a, affirming the decision of the Circuit Court.

The notice of appeal was filed by appellants with the Clerk of the Supreme Court of Oregon on January 29, 1968.

Jurisdiction to review a decree of the highest court of a state by appeal is conferred on this Court by 28 U.S. Code, § 1257 (2) and § 2101 (c). That such jurisdiction exists in the circumstances of this case is sustained by the following decisions: Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 66 L.Ed.239(1922),

42 S.Ct. 106; Standard Oil Co. v. Johnson, 316 U.S. 481, 86 L.Ed. 1611 (1942), 62 S.Ct. 1168; United States v. Allegheny County, 322 U.S.174, 191, 88 L.Ed. 1209 (1944), 64 S.Ct. 908; Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 98 L.Ed. 546 (1954), 74 S.Ct. 403.

STATUTES INVOLVED

The logger's and woodworker's statute, one limitation of which is contended by appellants to be unconstitutional, is found in Sections 87.125, 87.130, 87.135, 87.140, 87.645 and 87.670, Oregon Revised Statutes, Volume 1, pages 679, 680, 695, and 696.

These are set forth verbatim in Appendix, Exhibit D, infra, page 4a. For convenience, the section creating and defining the logger's lien is quoted at this point, as it was until September, 1967:

"87.125 Logger's lien. Every person performing labor upon or who shall assist in obtaining or securing sawlogs, spars, piles, cordwood or other timbers, has a lien upon the same for the work or labor done upon or

in obtaining or securing the same, whether such work or labor was done at the instance of the owner or his agent. The cook in a logging or other camp, and any and all others who may assist in or about a logging or other camp maintained for obtaining or securing sawlogs, spars, piles, cordwood or other timber, shall be regarded for the purpose of this section, as a person who assists in obtaining or securing sawlogs, spars, piles, cordwood or other timber."

The remainder of this statute, Sections 87.625, 87.640, 87.650 to 87.665, and 87.675, Oregon Revised Statutes, is also set forth verbatim in the Appendix, Exhibit D, infra, page 4c.

The mechanic's and materialman's lien statute is in Sections 87.005 to 87.075, Oregon Revised Statutes, Volume 1, pages 672 to 676. The section creating and defining this lien provides:

"87.010 Liens of mechanics and materialmen; who is entitled to lien. (1) Any mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman or other person performing labor upon, transporting or furnishing any material to be used in the construction of any improvement shall have a lien upon the improvement for the labor, transportation or material furnished at the instance of the owner of the improvement or his agent.

(2) Any person who shall, at the re-

quest of the owner of a lot, grade, fill in or otherwise improve the lot or the street adjoining the lot, shall have a lien upon the lot for such work done and materials furnished."

The mechanic's lien statute was originally enacted in 1895 and the logger's and woodworker's lien statute in 1891. Both were repealed and reenacted simultaneously in 1953, however, upon the adoption of the Oregon Revised Statutes as an independent enactment and not merely as a compilation of prior law: State of Oregon v. Holland, 202 Or. 656, 277 P.2d 386 (1954); State of Oregon v. Davis, 207 Or. 525, 296 P.2d 240 (1956).

QUESTION PRESENTED

Whether Section 87.125, Oregon Revised Statutes, construed by the Supreme Court of Oregon in the present case, to mean that an employer may not have a logger's lien thereunder for the labor of his employees, denies to appellants the equal protection of the laws guaranteed by the Fourteenth Amendment, inasmuch as an employer may have a mechanic's

lien for the labor of his employees under like circumstances.

STATEMENT

The Parties

For convenience, when it becomes necessary to distinguish between appellees, they will be designated by name, as follows: The two Balcoms doing business as D & L Logging Company, or Co., will be referred to as "the Balcoms;" and all the other appellees will be referred to as "Caffall Brothers."

The Proceedings, Including the Manner of Raising the Constitutional Question

This suit was brought in equity by appellants to recover the amount due them for hauling logs pursuant to a contract with the Balcoms. This was a subcontract as the Balcoms had previously made a contract with Caffall Brothers, the owners of the logs, to cut and haul the logs for the latter.

The case proceeded to trial on the amended complaint, the fourth amended answer, and the reply.

The amended complaint is in the form of one to foreclose a logger's lien and for a judgment and sale of the logs as on execution.

Appellees pleaded affirmatively in their fourth amended answer that appellants are not entitled to a lien for the labor of their employees, and therefore appellants' lien notice contains lienable and non-lienable items which cannot be segregated by anything appearing on the face of the notice of lien, and that appellants' lien is therefore void.

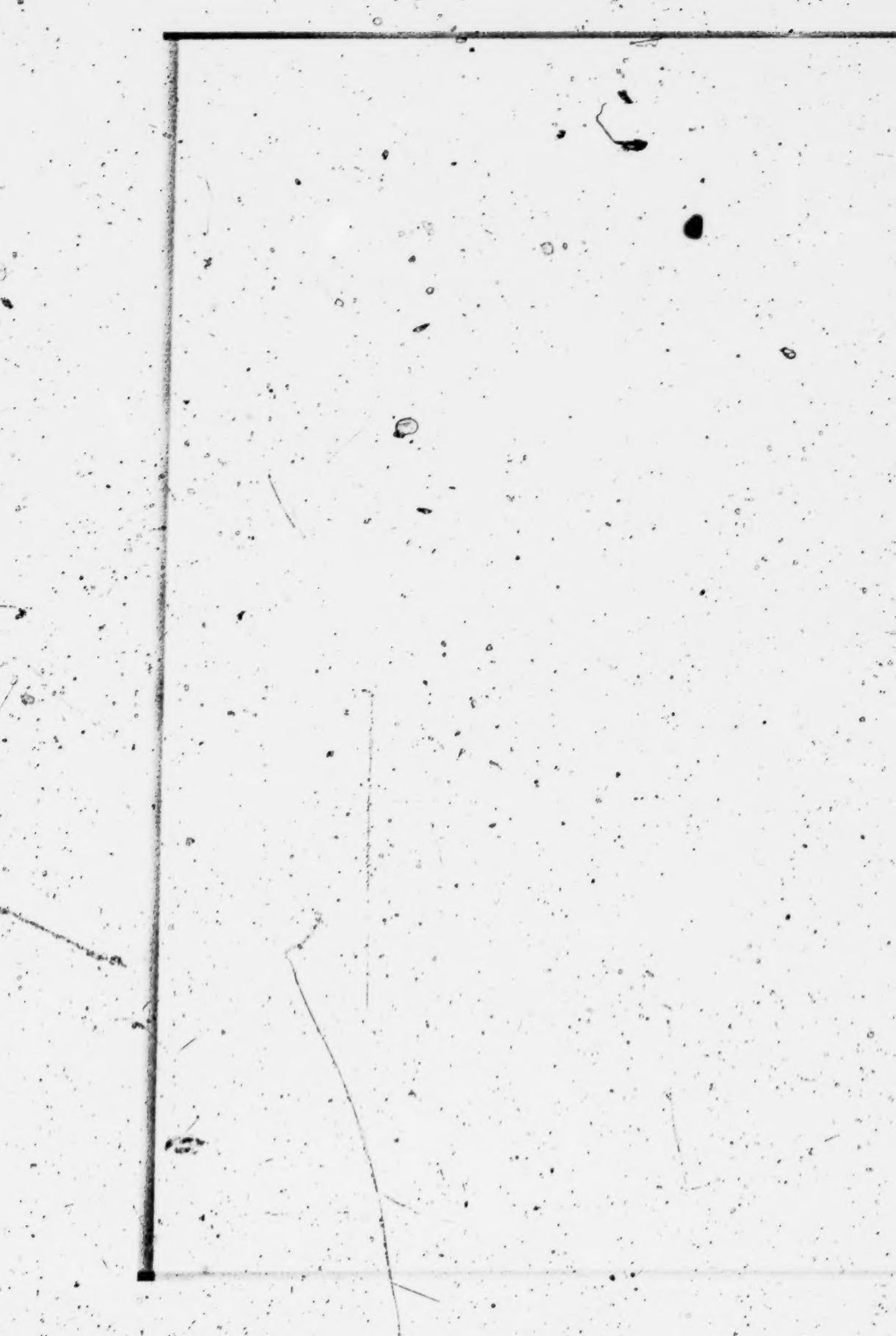
Appellants first raised this constitutional question by pleading their contention concerning it in their first affirmative reply to the affirmative answer of appellees which is mentioned in the preceding paragraph of this Statement, in these words:

"Paragraph II alleges: 'That ORS 87.125, by which the Plaintiffs' said lien was created, is unconstitutional and void insofar as it has been construed to mean that no employer is entitled to a lien under said statute for the labor of his employees, for the reason that said statute as so construed, denies to the Plaintiffs the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States,

and the protection of Article I, Section 20, of the Constitution of Oregon, for the reason that a hauler of building materials, including logs for use in the construction of an improvement, under like circumstances, is entitled to a mechanic's lien under ORS 87.010 for the labor of his employees, and ORS 87.125, therefore, to the extent mentioned, unreasonably and arbitrarily and without any fair and substantial reason relating to the general and legislative purpose to be accomplished, wrongfully, arbitrarily and unreasonably places the business of these Plaintiffs into an arbitrary and unreasonable class, and arbitrarily attempts to distinguish between the business of hauling building materials, including logs, to be used in the construction of an improvement, and the business of hauling logs to a log dump to be sold or to be cut into lumber and sold; that there is no peculiarity in the condition of those engaged in the latter business which justifies their segregation for the purpose of prohibiting them from having a lien for the labor of their employees.' "

During the trial, before appellants had concluded their proofs, appellees moved to dismiss the suit on the grounds stated in their affirmative answer. This motion is reported in the transcript of proceedings before the Circuit Court, Volume I, pages 21 to 24, and 56.

Counsel for appellants opposed the motion to dismiss and in doing so, stated their contention that the limitation in the logger's lien statute that an employer can not have a lien for the labor



of his employees, is unconstitutional and void in that it amounts to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment, and of the protection of the Constitution of Oregon.

This motion was considered by the Court twice during the trial.

On the first occasion counsel for appellants made these statements:

"THE COURT: Well, Mr. Hill, how do we get around the Oregon decision of McKinley vs. Tice, for example?

MR. HILL: I know that case well, your Honor, and as we have plead in one of our affirmative replies, we are contending that the logger's lien Statute insofar as it has been limited by that case to labor performed by the plaintiffs themselves and thereby excluding the labor of employees, to that extent the loggers lien Statute is unconstitutional and void.

It denies to the plaintiffs the equal protection of the law under the Fourteenth Amendment of the Constitution of the United States, and it denies to them the equality which is guaranteed by the Oregon Constitution, * * *"

* * * * *

"Now there is no substantial difference between an employer under the Mechanic's Lien Law and an employer under the Logger's Lien Law.

In McKinley against Tice the Court says point blank, we cannot permit an employer under the Logger's Lien Law to have a lien for his employees, but we do under the Mechanic's Lien Law.

They say right there, well, there is a difference between the two."

* * * * *

"* * *and so we don't have to look to the interpretation to see what it ought to be, other than to analyze this thing and see whether there is any real difference between an employer under the Mechanics Lien Law who has the employees hauling logs under that law and an employer under the Logger's Lien Law who hauls logs.

He may have the same type of equipment, his economic problems are exactly the same, his situation is the same.

There is no real difference between a hauler of logs under one law and under the other law and the cases which I will cite to the Court will establish that when the legislature confers a benefit on somebody such as employers under the Logger's Lien Law and they confer a benefit on somebody under the Mechanic's Lien Law, but they impose a limitation on employers under the Logger's Lien Law and say, well, you can't have a lien for the labor of your employees, that is a discrimination which is unconstitutional and void, because there is no real difference between the situation of a hauler in one situation and another hauler in another."

Transcript of Proceedings Before
the Circuit Court, Volume I,
pages 24 to 27.

On the second occasion counsel for appellants

made similar statements. See Appendix, Exhibit A, infra, page 1a.

The Circuit Court ruled in favor of the validity of the limitation in the statute that an employer may not have a logger's lien for the labor of his employees. Counsel for appellants asked leave to complete their proof. This was denied. Counsel for appellants then requested the Court to enter judgment against appellees for work and labor performed as in an action at law, on the ground that appellants had established their right to a judgment by stipulation and undisputed evidence.

The Circuit Court granted appellees' motion to dismiss and denied appellants the judgment requested. Subsequently an order was entered by that Court dismissing the suit and reserving to appellants their right to proceed at law against appellees.

Finally, this constitutional question was presented to the Supreme Court of Oregon in appellants' brief, pages 23 and 30 to 35, under these assignments of error:

I. The Court erred in ruling that the plaintiffs (appellants) do not have a valid logger's lien for the labor of their employees.

II. The Court erred in ruling that the plaintiffs' (appellants') lien notice is invalid on the ground that it contains lienable and non-lienable items.

III. The Court erred in dismissing this suit. And under this proposition, supported by points of law, authorities and argument:

PROPOSITION NO. 3

"If the McKinley case is applied to this case to deny the plaintiffs a logger's lien for the labor of their employees, this will deny to the plaintiffs the Equal Protection of the laws, guaranteed by the Fourteenth Amendment of the U. S. Constitution, and will deny the equality guaranteed by Art. 1, § 20, of the Constitution of Oregon."

These are the points of law stated under Proposition No. 3:

POINTS

1.

"The Equal Protection clause of the Fourteenth Amendment of the U. S. Constitution, and Art. 1, § 20, of the Constitution of Oregon, are alike in that they constitute similar limitations upon legis-

lative action, for the protection of the individual from arbitrary or capricious legislation. Both provisions constitute a pledge of the protection of equal laws.

2.

These constitutional provisions do not require that a statute shall affect all persons exactly alike, but they do guarantee like treatment to all persons similarly situated.

3.

No classification can be countenanced unless it is based on a real and substantial difference which is relevant to the purpose which the statute seeks to achieve.

4.

These constitutional provisions guarantee that no one may be subjected by statute to any greater burdens than are imposed on others in the same calling, or condition, or in like circumstances, and no burden can be imposed on one class of persons, natural or artificial, which is not in like conditions, imposed on all other classes. A statute infringes this guaranty if it singles out for discriminatory legislation particular individuals not forming an appropriate class, and imposes upon them burdens or obligations, or subjects them to rules from which others are exempt.

5.

The principle of equality includes within its application a granted privilege as well as a regulated right. Equality of benefit is no less required than equality of burden.

6.

In other words, a statute may not impose burdens on employers of individuals which are not imposed on individuals, nor grant privileges to individuals which are not granted to employers of individuals, where both groups are engaged in the same business, under similar conditions, and with similar needs, unless such classification is reasonable and is based upon a fair, real and substantial difference between the two groups, which is relevant to thepurpose which the statute seeks to accomplish.

7.

Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand.

8.

A single clause in a comprehensive statute may be declared unconstitutional on the ground that it violates these guaranties, leaving the remainder of the act valid and effective in all respects.

9.

A contractor or subcontractor is entitled to a mechanic's lien for the labor of his employees."

The Supreme Court of Oregon sustained appellees' contention that the lien of appellants is void on the grounds stated in appellees' motion to dismiss. The Supreme Court also denied appellants a judgment against Caffall Brothers for work and labor per-

formed, the Balcoms having in the meantime gone through Bankruptcy.

The Decision of the Supreme Court of Oregon is a Final Determination of All Causes of Action at Law in Favor of Appellants and against Caffall Brothers Based Solely Upon the Hauling Pleaded in this Case.

This is worthy of mention inasmuch as the Circuit Court dismissed this suit "with leave for plaintiffs (appellants) to proceed on the law side of the court." The Circuit Court had previously ruled that it had no jurisdiction in this equity case to enter a judgment for appellants for work and labor performed as in an action at law, but the Supreme Court of Oregon considered appellants' claim for a judgment on the merits and ruled, in effect, that appellants had no cause of action at law against Caffall Brothers based solely upon the hauling pleaded in this case.

The assertions in the preceeding subheading and in the preceeding paragraph in this Statement are not intended to include or apply to a

possible claim by appellants against Caffall Brothers which might be made once the lien of appellants is declared to be valid, that Caffall Brothers have injured, impaired, destroyed or rendered difficult or impossible of identification the logs hauled by appellants on which appellants have or had a logger's lien, within the meaning of Section 87.675, Oregon Revised Statutes.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important constitutional question, never considered by this Court, involving the power of the State of Oregon to discriminate between persons engaged in the same occupation, hauling logs or piles, using the same or similar equipment, and with the same problems and needs, that is, under like circumstances.

The Supreme Court of Oregon in this case sustained the validity of the limitation that a hauler of logs to a mill pond does not have a logger's lien for the labor of his employees in

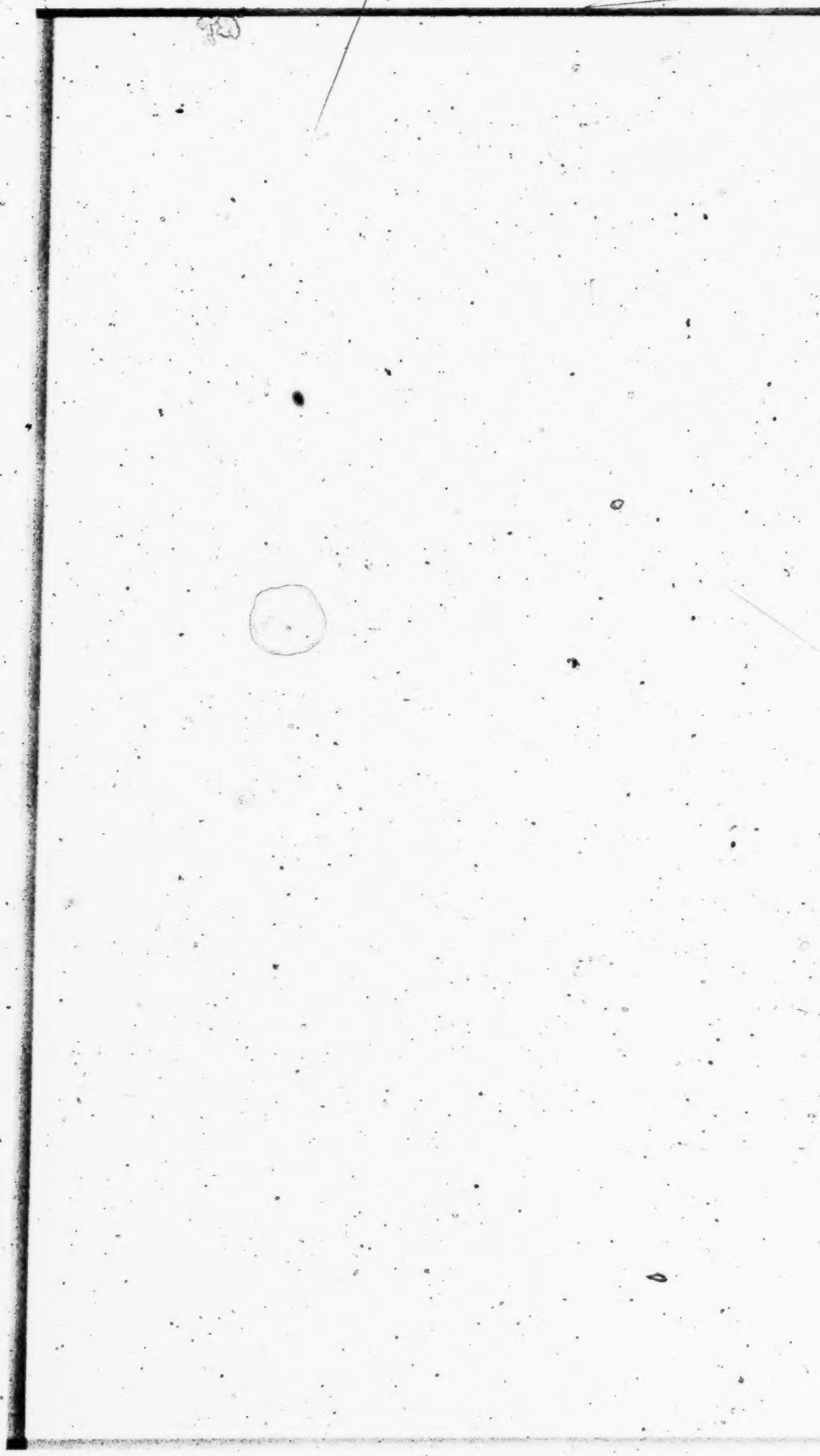
spite of its previous ruling, in effect, that one who hauls logs or piles to an improvement does have a mechanic's lien for the labor of his employees.

The entire opinion of the Supreme Court of Oregon on this question, following a statement of appellants' contention, is found in these words:

> "Clearly, there are sufficient differences between the logging industry and the construction industry to provide a reasonable basis for providing different procedures for protection of workmen's pay. There is no merit in plaintiffs' (appellants') contention."

Those entitled to loggers' liens are primarily engaged in the cutting, handling and hauling of logs, and much or most of this work is done in the woods. Those entitled to mechanics' liens include people performing labor on improvements, primarily buildings and structures of various kinds, and people who furnish materials for use in the construction of such improvements, including haulers of materials.

There is certainly a difference between these



two general classes, but, we respectfully contend, not such a difference as will justify the pronounced disparity in treatment which we are considering here.

In the first place, we contend that it is entirely immaterial that these two haulers we are considering, one to a mill pond and one to an improvement, belong to different, general classes of workers.

The only real question here is whether the Oregon legislature has discriminated against these appellants by denying to them the right to a logger's lien for the labor of their employees, whereas others engaged in the same business, under the same circumstances, are granted a mechanic's lien for such labor.

The language of the Fourteenth Amendment itself indicates that this contention is sound: No state shall deny to "any person" within its jurisdiction the equal protection of the laws.

The true meaning of this clause was stated by this Court in Hill v. Texas, 316 U.S. 400,

86 L.Ed. 1559, 62 S.Ct. 1159 (1942), to be that it is a command which the state must respect, the benefits of which every person may demand.

In the second place, no statutory discrimination can stand unless it is based upon a real and substantial difference which is relevant to the purpose which the statute seeks to achieve: Hartford Co. v. Harrison, 301 U.S. 459, 81 L.Ed. 1223, 57 S.Ct. 838 (1937); Morey v. Doud, 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344 (1957).

We respectfully contend that no such relevance has been shown or found to exist in this case.

The True Situation Here

The contract between appellants and the Balcoms contemplated that the hauling to be done by appellants would be far more than they could do themselves, as individuals.

In fact, the contract included provisions for the sale of eight trucks and trailers by the Balcoms to appellants to enable the latter to do the hauling specified by the contract, with four

trucks and trailers already owned by the appellants. See Exhibit A attached to the amended complaint. Actually, appellants themselves, as individuals, did only 11% of the hauling for which this lien is claimed, and the remaining 89% was done by their employees.

Years ago, the Supreme Court of Oregon held that a hauler of cordwood was entitled to a logger's lien for his own labor and for his team as well, on the ground that the statute did not contemplate that "logs or cordwood shall be secured or handled altogether by hand."

Weissenfels v. Schaffer, 99 Or. 228, 195 P. 362 (1921).

The court has adopted the same rule in mechanic's lien cases, and in Mathis v. Thunderbird Village, Inc., 236 Or. 425, 389 P.2d 343 (1964), held that a claimant was entitled to a lien for the cost of renting certain heavy equipment, including a ditch digger, where the parties had agreed that such cost would be paid by the owner.

Certainly there is a necessary implication of fact, at least, in the present case that appellants would be paid by the Balcoms under their contract for all hauling done by appellants' employees, as appellants could not do it all themselves.

We respectfully contend that the Weissenfels and Mathis cases constitute a recognition by the Supreme Court of Oregon that there is actually a great deal of similarity between those who claim and are awarded loggers' liens and those who secure mechanics' liens, and that their problems are alike or very similar.

In fact, the Court has adopted other rules which are the same under these two statutory provisions, which point to the same conclusion, such as the following: A subcontractor has a lien for work done by him; Spratt v. Brown-Petzel Lumber Co., 105 Or. 672, 210 P. 700 (1922) (Logger's); Christman v. Salway, 103 Or. 666, 205 P. 541 (1922) (Mechanic's).

The Importance of This Question

Certain additional facts in this case and collateral rules of Oregon law must be considered at this point.

Appellants agreed to and did pay their own employees periodically, before the money for appellants' hauling was due to them from the Balcoms under their contract. Thus when the Balcoms failed to pay appellants in accordance with their contract, appellants had already paid their employees. As a result, the employees could not file lien notices as this would have required them to state under oath that they had not been paid.

Furthermore, appellants could not have protected themselves readily upon paying their employees, or at all, against the eventuality that the Balcoms would not pay appellants for this hauling when such payment should become due.

The reason for this is that under Oregon law a purported assignment by an employee of his wage claim to his employer upon receiving his

wages, will transfer the employee's chose in action only and not the employee's lien, or right to perfect a lien. The assignment is effective to transfer the lien itself only when it is delivered to the employer after the employee's lien is perfected by filing the sworn lien notice: Alderson v. Lee, 52 Or. 92, 96 P. 234 (1908).

Thus an employer can not protect himself from possible future default by the other contract party, such as the Balcoms here, except by anticipating such default and proceeding as follows: Refuse to pay his employees when their wages become due. Require each employee to sign and swear to a notice of lien asserting the wages due him. File each notice of lien with the County Clerk. Thereafter, pay each employee the amount due him and at the same time take an assignment of lien from him.

Here the defaults of the Balcoms consisted in their failure to pay for only three weeks and two days of consecutive hauling, with one minor exception.

Certainly at the beginning of such defaults, appellants could not have protected themselves as they had already paid their men. Later, if they had anticipated further defaults, they could have protected themselves by the cumbersome method above outlined if they had known of all this, and had felt it to be necessary.

The Commingling in Appellants' Lien Notice

This commingling was the voluntary act of appellants, or of their counsel rather, but exactly the same questions would have been raised, and would now be presented, if appellants' own labor, as individuals, had been segregated in the lien notice from that of their employees.

The Public Interest In This Question

We think it plain that this case presents a question of substantial importance to the people of the State of Oregon, as its logging and woodworking industry, with its collateral enterprises, is the largest in the state. In fact, a number of other states have similar re-

sources, are faced with similar problems, and have adopted remedies much the same as those in Oregon.

If the Supreme Court of Oregon is correct, one of these remedies is greatly curtailed, at least in Oregon, in the very sphere, in fact, in which all industry seems to be expanding. It is becoming less and less true that one man or two can keep up with the demands of industry.

The correctness of such a view of the Fourteenth Amendment can be settled only by a decision of this court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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February, 1968